Filed 4/10/09 In re M.S. CA4/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. M.S., Defendant and Appellant.	E044671 (Super.Ct.No. RIJ115440) OPINION

APPEAL from the Superior Court of Riverside County. Robert J. McIntyre, Judge. Affirmed as modified.

Stephen S. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzales,

Andrew Mestman and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

The Riverside County District Attorney filed a Welfare and Institutions Code[1] section 602 petition alleging that defendant and appellant, M.S. (minor), committed a robbery. (Pen. Code, § 211.) The petition also alleged that minor personally used a deadly and dangerous weapon (a knife), within the meaning of Penal Code sections 12022, subdivision (b)(1) and 1192.7, subdivision (c)(23). A juvenile court found the allegations true, adjudged minor a ward of the court, and placed him on probation in the custody of his parents.

On appeal, minor contends: 1) there was insufficient evidence to support the true findings; 2) several of the probation conditions imposed must be stricken or rewritten; and 3) the court improperly imposed a restitution fine. The People concede, and we agree that one of the probation conditions should be modified. Otherwise, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of October 26, 2007, Jose Garcia (the victim) was selling ice cream from a cart. Three males came out of an apartment building, approached him, and began to take ice cream bars out of the cart. One of them asked the victim for the money, and another one pulled out a knife. One of the males struck the victim in the face, so the

[1] All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

victim took the money and ran. The three males took the cart inside the apartment building. A woman helped the victim call the police.

Officer Jeffrey Acosta responded to the call. The first person he talked to on the scene was a man named Herrera. The officer then talked to the victim, with Herrera translating. After gathering information about the robbery, Officer Acosta contacted a helicopter and additional patrol units to look for the suspects. Soon thereafter, a group of individuals was detained a few blocks away at a 7-Eleven store. Officer Acosta drove the victim and Herrera to the location where the suspects had been detained to do an in-field identification. The police showed the victim seven of the people who were detained. From the back seat of the patrol car, the victim looked out the window and identified two of the suspects as the robbers. He positively identified minor, within 10 seconds of seeing him in the show-up, as the one who held the knife during the robbery.

After the identification, the police went back to the apartment building to investigate. The police had information that the suspects had gone to apartment No. 96 after the robbery. The police went to that apartment and found cream in the freezer that did not belong to the resident.

ANALYSIS

I. There Was Sufficient Evidence to Support the Court's True Findings

Defendant contends the evidence was insufficient to support the court's finding that he participated in the robbery. Specifically, he argues that the judgment should be

reversed because neither the victim nor the translator (Herrera) could identify minor in court at the contested jurisdictional hearing. We conclude the evidence was sufficient.

A. *Background*

The victim testified at the contested jurisdictional hearing. When asked if he could describe the three individuals who approached him on the day of the robbery, the victim said he could no longer recall. When asked if he recognized the person who pulled out the knife, the victim said he could not recall anymore and that he could not remember the face very well.

Herrera, the translator, also testified at the hearing. He said that on the day of the robbery, he accompanied the victim to the in-field showup and was able to accurately interpret for the officer what the victim said. Herrera testified that the victim positively identified the person who had pulled the knife on him earlier. He said the victim was shown eight or nine possible suspects to determine who had pulled a knife on him. Herrera also said the victim did not hesitate at all when he identified the person who pulled the knife.

Officer Acosta testified at the hearing as well. He testified that the victim positively identified defendant as the person who held up the knife during the robbery. Officer Acosta then identified defendant in court as that person.

After all the testimonies were presented and closing statements were made, the court stated: "The Court too was concerned as to the circumstances surrounding the identification of the minor. When there's not an identification in open court, the

circumstances surrounding the identification in the field become a bit more important; however, after reviewing the testimony and after reviewing the circumstances surrounding it, the Court does believe that it was an accurate identification that day. And the Court does believe the charges have been proven beyond a reasonable doubt. [¶] The Court notes that it was close in time to the crime itself. Yes, the person was nervous, but did not hesitate in the identification of the minor. Several of the people were Hispanics. The cross-racial nature of the identification, that was something I was looking at very closely because counsel is right. Statistically, that is where tremendous error has been shown in eyewitness identification. But multiple parties . . . African-American people were brought forward. He identified only two, not three. The third person involved he couldn't identify. It would show he's not simply identifying people to identify people. And that, in the Court's mind, is also a factor here." The court proceeded to find true beyond a reasonable doubt that minor committed the robbery and used a knife, as alleged.

B. *Standard of Review*

In addressing a challenge to the sufficiency of the evidence to support a true finding on a section 602 petition, we "'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371, 1373.) Moreover, "[i]n deciding the sufficiency of the evidence, a reviewing court resolves neither credibility

issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181 (*Young*).)

C. *The Evidence Was Sufficient*

Minor does not contest the proof of any of the elements of robbery. Rather, he claims that "the in-field identification was sufficiently weak . . . ." He further complains the only evidence connecting minor with the robbery and use of a knife was Officer Acosta's testimony identifying minor in court as the person whom the victim identified at the in-field identification. We note that "testimony of a single witness is sufficient to support a conviction. [Citation.]" (*Young, supra,* 34 Cal.4th at p. 1181.) The officer testified that the victim, within 10 seconds of seeing defendant in the showup, positively identified defendant as the one who held the knife during the robbery. Herrera concurred that the victim positively, and without hesitation, identified the person who had pulled the knife on him. No inherent unreliability appears in the identification testimony of the officer. The court, as the sole judge of the credibility of witnesses, clearly found Officer Acosta completely credible, and we accept that determination. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1447.)

Moreover, the court considered the circumstances and expressed its concern about the evidence, since the victim could no longer recall what minor looked like in court. The court reviewed the evidence very carefully before finding the allegations were true.

Viewing the evidence in the light most favorable to the judgment, as we must, we conclude there was sufficient evidence to support the court's true findings.

II. The Probation Conditions Imposed Were Proper, Although One Should Be Modified

Upon the recommendation of the probation officer, the court placed minor on probation in the custody of his parents. He now contends that five of the probation conditions should be modified to include a "knowledge" requirement, three of them should be stricken since there is no nexus between them and his offense or rehabilitation, and one must be stricken because it is "legally infirm." The People argue, and we agree, that one of the conditions should be modified, but the others should be imposed as ordered.

At the outset, we note that the juvenile court "has wide discretion to select appropriate conditions and may impose '"any reasonable condition that is 'fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.'"' [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) "The juvenile court's broad discretion to fashion appropriate conditions of probation is distinguishable from that exercised by an adult court when sentencing an adult offender to probation. Although the goal of both types of probation is the rehabilitation of the offender, '[j]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor's reformation and rehabilitation.' [Citation.] '[J]uvenile probation is not an act of leniency, but is a final

order made in the minor's best interest.' [Citation.] [¶] In light of this difference, a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court. [Citations.]" (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81-82, disapproved on other grounds in *In re Jaime P.* (2006) 40 Cal.4th 128, 130.)

Furthermore, "[t]rial courts have broad discretion to set conditions of probation in order to 'foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.' [Citations.] . . . [¶] However, the trial court's discretion in setting the conditions of probation is not unbounded. . . ." (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624 (*Lopez*).) A term of probation is invalid if it "'(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, *and* (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486, italics added; *People v. Olguin* (Dec. 29, 2008, S149303) 45 Cal.4th 375, 379, 380 [198 P.3d 1, 2008 Cal. Lexis 14603].)

A. *One Probation Condition Should Be Modified to Include a "Knowledge" Requirement*

Minor first argues that the following five conditions are vague and overbroad and must be rewritten to only prohibit a *knowing* violation[2]:

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[2] In imposing the conditions of probation, the court adopted the terms "A through T" from the probation officer's report. For the sake of clarity, we will identify the probation conditions by the letter designations used in the probation officer's report.

"l. Not possess, consume, inhale, or inject any intoxicants, alcohol, narcotics, aerosol products, or other controlled substances, poisons, illegal drugs, including marijuana, nor possess related paraphernalia; [¶] . . . [¶]

"p. Not possess or have immediate access to weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, and knives;

"q. Not associate with anyone who has possession of weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, and knives; [¶] . . . [¶]

"s. Not possess or have immediate access to any incendiary/explosive device(s);

"t. Not possess or have immediate access to oleocapsicum pepper spray or tear gas."

Minor's contention that condition "q" is unconstitutionally overbroad is well taken. Prohibiting association with anyone who has possession of weapons without restricting the prohibition to persons minor *knows* possesses weapons is overbroad. (See *In re Justin S.* (2001) 93 Cal.App.4th 811, 816.) The appropriate remedy is to modify the condition, as minor asks and the People agree, to narrow its reference to persons known to minor to possess weapons. (See *Ibid*.) We shall therefore grant minor's request to modify condition "q."

However, as to the other four conditions, which prohibit minor from possessing certain items, we think the element of knowledge is implied in the conditions. (See *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117 (*Acuna*).) It is difficult to

imagine minor *unknowingly* possessing alcohol or other controlled substances, weapons, incendiary/explosive devices, or pepper spray. Minor argues he could possess an item "such as a hammer, scissors, plastic water gun, or hair spray that could later be determined to be a weapon or incendiary device without [his] knowledge of improper possession." However, a probation term should be given "the meaning that would appear to a reasonable, objective reader." (*People v. Bravo* (1987) 43 Cal.3d 600, 606.) Furthermore, to the extent the element of knowledge might not be implied in the conditions, we are confident that the trial court will impose such a limiting construction on the conditions by inserting a knowledge requirement, should it be alleged that minor violated any of these conditions. (*Acuna*, *supra*, at p. 1117.) Therefore, we see no need to modify the four challenged conditions.

B. *The Court Properly Imposed the Other Conditions*

Minor contends the following three conditions have no reasonable nexus to his offense or rehabilitation, and, thus, must be stricken:

"f. Not . . . associate with individuals who are known gang members . . . ; [¶] . . . [¶]

"k. Participate in counseling/psychotherapy as deemed necessary by parent(s)/guardian(s)/Probation Officer/Therapist . . . ; [¶] . . . [¶]

"o. Submit to chemical test(s) of blood, breath, or urine for alcohol/controlled substances, as directed by the Probation Officer or any law enforcement officer[.]"

The court did not abuse its discretion in imposing any of these conditions.

1. *The Gang-Related Condition*

Minor argues that because the offense was not gang related, and mere gang membership is not a crime, the gang-related condition should be stricken. We disagree.

"Prohibitions against a variety of gang-related activities have been upheld when imposed upon juvenile offenders. [Citations.]" (*Lopez, supra*, 66 Cal.App.4th at p. 624.) "[P]robation terms have been approved which bar minors from being present at gang gathering areas, [and] associating with gang members . . . . [Citation.]" (*Ibid.*) "Because '[a]ssociation with gang members is the first step to involvement in gang activity,' such conditions have been found to be 'reasonably designed to prevent future criminal behavior.' [Citation.]" (*Ibid.*)

Minor's probation report disclosed subtle references to gang association. He committed the instant offense with the help of two other males. Also, minor considered himself to be a follower because he usually went along with his friends' suggestions for activities. On one occasion, minor was suspended from school "for being involved with a group of boys preparing to fight another group." Thus, the imposition of the gang-related condition was a reasonable preventive measure in helping him to avoid future criminality and to set him on a productive course. (*In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1502 (*Laylah K.*).) Moreover, the term was not punitive and was imposed to simply help minor keep away from gangs.

Minor additionally asserts this condition was improper for the reason that it was "legally infirm" because the STEP Act (the California Street Terrorism Enforcement and

Prevention Act) does not criminalize mere gang membership. As such, he reasons, mere association with known gang members may not be legally precluded. Minor is wrong. Probation terms have been approved which bar minors from associating with gang members. (*Lopez, supra*, 66 Cal.App.4th at p. 624.) Furthermore, "the environment in which a probationer serves probation is an important factor on the likelihood that probation will be successfully completed. . . ." (*People v. Robinson* (1988) 199 Cal.App.3d 816, 818 (*Robinson*).) By prohibiting minor from associating with gang members, the court was placing a control over minor that would assist him in successfully completing probation. (*Ibid*.) We hold that the court properly imposed the challenged condition.

2. *The Counseling/Psychotherapy Condition*

Minor next argues that "nothing about the offense suggest[ed] any deficiency in [his] emotional or mental make-up," and that the counseling/psychotherapy condition could not relate to rehabilitation because the probation report "clearly indicated that [he] suffered from no mental health or abuse issues and had established good family relationships." However, the record demonstrates that minor had many concerns and issues that needed to be addressed, including his complete denial of his role in the offense, possible attention deficit hyperactivity disorder (ADHD), poor attendance at school, and poor grades (he was failing all but two classes). Furthermore, minor had been suspended from school three times during the current school year, and he blamed his teachers for the suspensions. Minor took no responsibility for his disruptive and

defiant behavior. The probation officer opined that minor had "a problem with authority and following through." We conclude that the counseling condition was related to minor's rehabilitation and was therefore properly imposed.

3. *Submission to Chemical Testing*

Finally, minor argues there was no nexus between the condition that he submit to chemical tests of blood, breath or urine for alcohol or controlled substances since there was nothing about the offense indicating that alcohol or controlled substances were involved. However, "[c]hemical testing is expressly authorized by statute in cases where the minor is not removed from parental custody. [Citation.]" (*Laylah K.*, *supra*, 229 Cal.App.3d at p. 1502; § 729.3.) Here, minor was placed on probation in his parents' custody, and he admitted smoking marijuana once. Thus, the court did not abuse its discretion in imposing this condition.

III. There Is No Need to Remand Concerning the Restitution Fine

Minor contends the $100 restitution fine imposed by the court was improper because the court did not articulate whether it was imposed under section 730.5 or section 730.6. He asserts that the fine must be vacated and the matter remanded to the juvenile court. We disagree.

The court stated the following: "The restitution fine in the amount of $100 as required by law is ordered." As minor points out, the court failed to designate whether the fine was imposed under section 730.5 or section 730.6. Section 730.5 provides: "When a minor is adjudged a ward of the court on the ground that he or she is a person

described in Section 602 . . . the court may levy a fine against the minor up to the amount that could be imposed on an adult for the same offense, if the court finds that the minor has the financial ability to pay the fine. . . ." Here, because the court did not make a determination about minor's financial ability to pay, we infer the restitution fine was not imposed under this section.

Section 730.6, subdivision (b), provides: "In every case where a minor is found to be a person described in Section 602, the court shall impose a separate and additional restitution fine. The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense as follows: [¶] (1) If the minor is found to be a person described in Section 602 by reason of the commission of one or more felony offenses, the restitution fine shall not be less than one hundred dollars ($100) and not more than one thousand dollars ($1,000). . . ."

Here, minor was found to be a person described in section 602 because he committed a felony offense. The court thus imposed a restitution fine of $100 as required by section 730.6. Although the court neglected to explicitly state the fine was imposed under section 730.6, we can infer it was, since the court imposed a $100 fine "as required by law." Minor argues that if the fine was imposed under section 730.6, it was unlawful because it was ordered to be paid to multiple jurisdictions. He is referring to the clerk's transcript, which states: "Minor is ordered to pay a restitution fine in the amount of $100.00 (Desert & Riverside)." However, the reporter's transcript makes no reference to "Desert & Riverside," as shown in the minute order. It is well settled that "[a]ny

discrepancy between the minutes and the oral pronouncement of a sentence is presumed to be the result of clerical error. Thus, the oral pronouncement of sentence prevails in cases where it deviates from that recorded in the minutes. [Citation.]" (*People v. Price* (2004) 120 Cal.App.4th 224, 242.) Moreover, restitution is paid to the victim who incurs economic loss as a result of the minor's conduct, not to a jurisdiction. (§ 730.6.)

Therefore, there is no need to remand the matter, as minor claims. The $100 restitution order stands under section 730.6.

DISPOSITION

The judgment is modified as to condition "q." of defendant's probation conditions, which is modified to read: "q. Not associate with anyone known to defendant to possess weapons of any kind, including but not limited to: firearms, firearm facsimile, nunchakus, martial arts weaponry, and knives[.]" Otherwise, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

RICHLI
J.